

*In the Matter of Myra Darius*  
DOP Docket No. 2005-3465  
**(Merit System Board, decided April 5, 2006)**

The appeal of Myra Darius, a Building Maintenance Worker with Camden County, of her removal, effective February 24, 2005, on charges, was heard by Administrative Law Judge (ALJ) Joseph F. Fidler, who rendered his initial decision on January 12, 2006. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on April 5, 2006, accepted and adopted the Findings of Fact and Conclusions as contained in the attached initial decision and the recommendation that the removal be upheld.

## **DISCUSSION**

The appellant was charged with insubordination, conduct unbecoming a public employee, and violations of the County's sexual harassment and drug and alcohol testing policies. Specifically, the appointing authority asserted that, on January 5, 2005, the appellant's supervisor, James Olivo, ordered her to submit to alcohol testing based on his reasonable suspicion that she was under the influence of alcohol while on duty. The appointing authority alleged that the appellant refused to comply with this directive, and she responded to the order by calling Olivo a sexually derogatory name. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ set forth that, on the afternoon of January 5, 2005, the appellant was summoned to Olivo's office in order to receive information regarding an assignment. Olivo testified that, upon her arrival, he detected the odor of alcohol on her breath. As a result, he conducted an interview with the appellant in the presence of three managerial employees and her union representative, in an attempt to ascertain her willingness to submit to "a physical examination to include a blood test and/or urinalysis so we can be sure you are in good health and able to safely perform your job." The appellant refused this request, and Olivo opined that she was argumentative during the interview. Olivo testified that he then read a statement to the appellant, advising her that the refusal to submit to alcohol testing would be considered insubordination and a presumption that she was intoxicated. Olivo further advised the appellant that she would be disciplined if she did not comply with his request to be tested. The appellant still refused. At the conclusion of the interview, Olivo heard the appellant

refer to him as “a little faggot” as she was exiting the room. On January 6, 2005, Olivo again summoned the appellant to his office to discuss an unrelated issue. Olivo testified that she was again argumentative and referred to him as “a little faggot” during this exchange. Frank Gorman, a Labor Relations Assistant who was present during the appellant’s interview on January 5, 2005, also testified that he detected a strong odor of alcohol on the appellant’s breath. He confirmed that Olivo asked the appellant to submit to an alcohol test, and she declined. Gorman further witnessed Olivo instruct the appellant that she would be subjected to disciplinary action if she refused to take an alcohol test, and he supported Olivo’s assertion that the appellant was uncooperative during the interview process. Gorman also testified that he heard the appellant refer to Olivo as “a little faggot” as she left the room. Robert Tonsberg, a Director of Security whose office is next door to Olivo’s, overheard the appellant arguing with Olivo on January 6, 2005, and he heard the appellant call Olivo “a little faggot.”

John Sciarra, the appellant’s union representative, who was also present at the January 5, 2005 interview admitted that an odor emanated from the appellant on January 5, 2005, but he did not specifically identify it as alcohol. He confirmed that the appellant refused to submit to an alcohol test, and he acknowledged that she was told that she could be disciplined if she refused. However, Sciarra also testified that the appellant cooperated during the interview process. He also indicated that he was unaware that an employee could be terminated for refusing to submit to an alcohol test, and, had he been aware of this fact, he would have advised the appellant to cooperate. Sciarra did not hear the appellant’s derogatory comment to Olivo. The appellant maintained that she was not under the influence of alcohol, and she was not told that her refusal to participate in testing would be considered insubordination or a positive test result. She also testified that she was not told that her refusal could be grounds for removal. While the appellant denied calling Olivo an inappropriate name on January 5, 2005, she admitted that she did so during their January 6, 2005 meeting.

The ALJ found that the testimony of Olivo, Gorman, Tonsberg and Sciarra was credible. Thus, the ALJ determined that Olivo possessed a reasonable suspicion that the appellant was under the influence of alcohol while on duty on January 5, 2005, and as a result of this suspicion, he ordered that she submit to alcohol testing. He found that the appellant was specifically notified during her interview that her refusal could be considered insubordination and could result in disciplinary action. In addition, the ALJ found sufficient credible evidence existed to support the assertion that the appellant was uncooperative during the interview, and she referred to Olivo on two occasions as “a little faggot.” Based on these findings, the ALJ recommended upholding all charges. With regard to the penalty, the ALJ initially found that the appellant’s claim “that one other employee received a minor discipline for an alcohol violation do[es] not establish that she has suffered impermissibly disparate treatment in this matter.” Specifically, the ALJ noted

that, in addition to the charge that the appellant violated the County's alcohol policy, she committed other serious infractions. The ALJ also considered the appellant's six-month suspension in 1998 on charges relating to drinking alcohol while on duty and concluded that removal was an appropriate penalty.

In her exceptions to the ALJ's initial decision, the appellant argues that the ALJ erred in upholding the charges against her and imposing a removal. Initially, the appellant argues that Olivo lacked the reasonable suspicion necessary to require her to undergo alcohol testing. She asserts that the record did not demonstrate any objective indicia that she was intoxicated on January 5, 2005. In this regard, she emphasizes that the witnesses did not observe her stumbling, slurring her speech, speaking incoherently, etc. The appellant also argues that her failure to take an alcohol test did not constitute insubordination because Olivo was seeking her voluntary participation in the test, and his request that she submit to an alcohol test was not a direct order. In addition, the appellant claims that, contrary to the ALJ's findings, the evidence in the record indicates that she was not instructed that her refusal to participate would be considered insubordination and evidence of intoxication. Moreover, the appellant contends that there was insufficient evidence that she was uncooperative with the interview on January 5, 2005, and she denies making a derogatory comment regarding Olivo on that date. She also notes that the testimony that she called Olivo a derogatory name on January 5, 2005 established that the remark was not directed towards Olivo. Rather, it was uttered when she was walking out of the room and had her back turned to Olivo. The appellant also maintains that any inappropriate comments she made were uttered in the heat of the moment, when she was extremely frustrated and felt singled out. Finally, the appellant asserts that, even if all of the charges are upheld, removal is too harsh a penalty. In this regard, she underscores that another employee who refused to take an alcohol test four years ago received only a three-day suspension. She also argues that removal is too harsh considering her long-term employment with the County. Relying on *West New York v. Bock*, 38 N.J. 500 (1962), the appellant contends that her only major discipline was too remote in time to be considered for the purposes of progressive discipline.

In its cross exceptions, the appointing authority maintains that the appellant's removal was appropriate. The appointing authority argues that the ALJ found that Olivo credibly testified that he informed the appellant that her refusal constituted insubordination and a positive test result, and it would lead to disciplinary charges. The appointing authority emphasizes that all witnesses confirmed that the appellant was informed that she could be disciplined for refusing to submit to the alcohol test. In addition, the appointing authority argues that no justification can be made for the appellant's inappropriate remark, and it asserts that there was ample credible testimony to support the finding that she made the remark on both dates. Concerning the penalty, the appointing authority contends that disciplinary action taken against another employee is irrelevant, since "an

employee's discipline must be looked at and determined on an individual basis including, among other things, the particular situation, the circumstances of the employee and the prior discipline of the employee." Stressing the appellant's prior six-month suspension on similar charges, the appointing authority argues that removal is an appropriate penalty.

The Board is not persuaded by the appellant's exceptions. Initially, the ALJ's factual findings were based primarily on his assessment of the credibility of the witnesses. In this regard, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, upon thorough review, the Board finds that there is nothing in the record evidencing that the ALJ's findings regarding the disciplinary charges were flawed or were not based on the credible evidence in the record.

The ALJ found that there was credible testimony that the appellant's breath smelled of alcohol on January 5, 2005, which gave Olivo reasonable suspicion that she was under the influence of alcohol and a sufficient justification for requiring that she submit to an alcohol test. Specifically, Olivo and Gorman both credibly testified that they detected a strong odor of alcohol on the appellant's breath, and Sciarra confirmed smelling an odor, though he could not positively identify it as alcohol. In addition, three credible witnesses testified that the appellant was clearly advised that she could be disciplined for her refusal to participate in the alcohol test. Regardless of whether or not the appellant was notified of the specific disciplinary charge or penalty for her refusal, the record amply supports a finding that she was specifically instructed that disciplinary action could be taken for her refusal. Certainly, the appellant should not be motivated to comply with a reasonable order of her supervisor only if there is a threat of termination. The ALJ also credited the testimony of Olivo and Gorman regarding the appellant's use of inappropriate language on January 5, 2005, and the testimony of Olivo and Tonsberg regarding her repeating this comment on January 6, 2005. Indeed, the appellant conceded that she called Olivo "a little faggot" on January 6, 2005. The Board finds the appellant's attempts to minimize her use of such language

unacceptable. Specifically, the fact that the appellant may have been exiting the room with her back turned to Olivo on January 5, 2005 is of no consequence. Olivo credibly testified that he was able to hear her inappropriate remark, and the County's policy prohibiting sexual harassment unequivocally provides that "[e]ven if an individual's actions are not directed to a particular person, his/her conduct may be considered sexual harassment." Thus, the appellant's contention that her language was excused because it was not directed towards Olivo is without merit. Further, the appellant's remaining defenses, *i.e.*, that she did not intend the term to be derogatory and she uttered the phrase out of frustration, simply do not excuse the use of such offensive language in the workplace. In short, the Board finds that the record amply supports the ALJ's finding that the appellant's conduct constituted insubordination, conduct unbecoming a public employee, and violations of the County's policies prohibiting alcohol use and sexual harassment.

In determining the proper penalty, the Board's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Board also utilizes, when appropriate, the concept of progressive discipline. *West New York, supra*. In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. Initially, the Board notes that the appellant's reliance on *Bock* in arguing that her six-month suspension was too remote in time is misplaced. In *West New York*, the Court concluded that:

[A]pplying the principles we have just laid down, we think none of Bock's 'past record' should be considered. There was no adjudicated disciplinary action more recent than one occurring approximately 7 years before the hearing . . . And, there was no competent evidence of any recent warnings. So the case must stand, with respect to penalty, only on Bock's guilt of the three instances specifically charged. *West New York* at 524.

However, unlike the appellant in *West New York*, the appellant in this matter had two additional disciplinary infractions, a one-day suspension in 2002 and a three-day suspension in 2001, in addition to her six-month suspension on similar charges approximately seven years prior to the current infraction. Based on *West New York*, the Board is not precluded from considering an employee's disciplinary history that is more than seven years old. *See In the Matter of Jeffrey Jusko* (MSB, decided March 13, 2001). Thus, the Board finds that the ALJ appropriately considered the appellant's six-month suspension for purposes of progressive discipline.

Similarly, the Board is not persuaded that the appellant was treated unfairly, since another employee who refused to take an alcohol test several years earlier only received a three-day suspension. As the ALJ found, the disciplinary

charges at issue also involved other serious misconduct, including the use of demeaning and offensive language in the workplace. In addition, unlike the employee to which the appellant compares herself, she had previously served a six-month suspension on charges related to imbibing alcohol while on duty, in addition to two recent minor disciplinary actions. It is further noted that her six-month suspension was the result of a settlement agreement that also required entry into a treatment program, passage of drug and/or alcohol tests prior to returning to work, and a one-year probationary period during which she would be randomly tested.

Accordingly, based on the totality of the record, including the nature of the appellant's offense and her prior disciplinary history, the Board finds that removal is the appropriate penalty.

## **ORDER**

The Merit System Board finds that the action of the appointing authority in imposing the removal was justified. Therefore, the Board affirms that action and dismisses the appeal of Myra Darius.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.